Supreme Court, U.S.
FILED
No. 931644 APR 11 1994
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IN THE

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1993

JAMES ROBERT BURCHARD and JUNE P. BURCHARD,
Petitioners,

v.

H. LAWRENCE GARRETT, III, Secretary, Department of the Navy,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JAMES R. BURCHARD,
appearing pro se
996 Olney Street East
Port Orchard, WA 98366
(206) 876-3281

28 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Court of Appeals can ignore the thrust of this Court's decisions in Houston v. Lack, 487 U.S. 266 (1988) and Parissi v. Telechron , 349 U.S. 46 (1955) and decide that the filing requirement of a Notice of Appeal within the purview of Fed. R. App. P 3 and 4 is the date that it is formally "filed" by the clerk of the District Court?

2.Whether the United States Court of Appeals can ignore the thrust of the last sentence of Fed. R. App. 4 (a) (1) , ..."If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted"..., and decide that the filing requirement of a Notice of Appeal is the date that it is formally "filed" by the clerk of the District Court?

PARTIES TO THE PROCEEDING

All of the parties in the United States Court of Appeals for the Ninth Circuit are listed in the caption.

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No.____

IN THE

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1993

JAMES ROBERT BURCHARD and JUNE P. BURCHARD,
Petitioners,

v.

H. LAWRENCE GARRETT, III, Secretary, Department of the Navy,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, James Burchard and June P. Burchard, request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this action on December 1, 1993.

OPINIONS BELOW

The Memorandum Opinion and Judgment of the United States Court of Appeals for the Ninth Circuit (Appendix F, 6a) has been designated "Not For Publication" by the court. The crux of the decision: "The government contends we lack jurisdiction because the notice of appeal is untimely. We agree and dismiss the appeal."

The Order Granting Defendant's Motion For Summary Judgment of the District Court (Appendix H, 11a) is reported at ____F. Supp._____.

JURISDICTION

The Memorandum Opinion and Judgment of the United States Court of Appeals for the Ninth Circuit was entered on December 1, 1993 (Appendix F, 6a). Petitioner timely filed a Petition for Rehearing and Suggestion for Rehearing En Banc. The court below entered an order (Appendix G, 10a) denying the Petition for Rehearing on January 11, 1994. This Petition for Certiorari is filed within ninety (90) days of that date. The jurisdiction of this Court to review the judgment on Petition for Certiorari rests upon Section 1254 (1) of the Judicial Code [28 U.S.C. § 1254 (1)].

STATUTE INVOLVED

This case involves Federal Rule of Appellate Procedure 4 (a) (1), which provides as follows:

Rule 4. Appeal as of Right- When Taken.

(a) Appeals in Civil Cases.

(1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of the entry of the judg-

ment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted.

STATEMENT OF CASE

On February 22, 1993 the District Court entered summary judgment for the Secretary of the Department of Navy (Appendix H, 11a). On April 13, 1993 the Petitioners sent their Notice of Appeal (Appendix A, 1a) to the Clerk of the District Court by certified mail. The return receipt (Appendix B, 2a and Appendix C,3a) shows that an employee of the office of the Clerk received the Notice of Appeal on April 14, 1993. On April 16, 1993 the Petitioners sent their Notice of Appeal to the Clerk of the Court of Appeals by certified mail. The return receipt (Appendix D, 4a and Appendix E, 5a) shows that the Clerk of the Ninth Court of Appeals received the Notice of Appeal on April 19, 1993. The last day to file the Notice of Appeal was April 23, 1993. Fed. R. App. P. 4 (a) (1).

On December 1, 1993 the Court of Appeals for the Ninth Circuit filed its Memorandum Opinion and Judgment (Appendix F, 6a). The crux of the decision: "The government contends we lack jurisdiction because the notice of appeal is untimely. We agree and dismiss the appeal."

A Petition for Rehearing was denied by the court below on January 11, 1994 (Appendix G, 10a).

REASONS FOR GRANTING WRIT

I.

Notice of Appeal is timely filed if received by the clerk of the District Court within the applicable period specified in Fed. R. App. P. 4 (a) (1).

In Houston v. Lack, 487 U.S. 266 (1988), this Court, speaking through Justice Brennan, stated at page 273:

> Respondent concedes that receipt of a notice of appeal by the clerk of the district court suffices to meet the "filing" requirement under Rules 3 and 4 even though the notice has not yet been formally "filed" by the clerk of the court. Parissi v.Telechron, Inc. 349 U.S. 46, 47, 99 l Ed 867, 75 S Ct 577 (1955); see also, e.g., Deloney v. Estelle, 661F2d 1061, 1062-1063 (CA5 1981); Aldabe v. Aldabe, 616 F2d 1089, 1091 (CA9 1980);United States v. Solly, 545 F2d 874, n876 (Ca 3 1976) But the rationale for concluding that receipt constitutes filing in the ordinary civil case is that the appellant has no control over the delays between the court clerk's receipt and formal filing of the notice. See, e.g.., Deloney, supra, at 1063; Aldabe, supra, at 1091; Solly, supra, at 876.

In Reinsurance Co. of America, Inc. v. Administratia, 808 F. 2d 1249 (7th Cir. 1987), the court started at page 1253:

> "Certified mail, return receipt requested, ...is designed...to furnish a sender of mail with proof of its delivery, and it is in return for this assurance, ...that certified mail is more costly."

The Clerk of the District Court received the Petitioners' Notice of Appeal on April 14, 1993. The certified mail return receipt (Appendix B, 2a and Appendix C, 3a) is independent third party written proof of receipt by the Clerk of the District Court. The last day to file the Notice of Appeal was April 23, 1993.

II.

Notice of Appeal is timely filed if received by the Clerk of the Court of Appeals within the applicable period specified in Fed. R. App. P. 4 (a) (1).

The pertinent portion of Fed. R. App. P. 4 (a) (1) provides:

> "If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted."

The clerk of the Court of Appeals received the Petitioners' Notice of Appeal on April 19, 1993. The certified mail return receipt (Appendix D, 4a and Appendix E, 5a) is independent third-party written proof of receipt by the clerk of the Court of Appeals. The last day to file the Notice of Appeal was April 23, 1993.

CONCLUSION

WHEREFORE, the petitioners pray that a Writ of Certiorari be granted to rectify:

1. the misapplication by the Ninth Circuit of this Court's opinions in Houston v. Lack, 487 U.S. 266 (1988) and in Parissi v. Telechron, 349 U.S. 46 (1955); and,

2. the misapplication by the Ninth Circuit of Fed. R. App. P. 4 (a) (1).

Respectfully submitted,
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Appendix

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

UNITED STATES DISTRICT COURT
OFFICE OF THE CLERK
UNITED STATES COURTHOUSE
2ND FLOOR
SEATTLE, WASHINGTON 98104

APRIL 12TH 1993

JAMES ROBERT BURCHARD
JUNE P. BURCHARD PLAINTIFF
996 OLNEY STREET EAST
PORT ORCHARD, WASHINGTON 98366
phone 206-876-3281

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF SEATTLE
AT SEATTLE

NUMBER C92-102R

ORDER GRANTING DEFENDANTS MOTION
FOR SUMMARY JUDGMENT

PLAINTIFF WISH TO APPEAL THE DECISION

PLAINTIFF DID NOT HAVE OPPORTUNITY HIS DEPOSITION, NOR PRE TRIAL, NOR MEDIATION, PLAINTIFF WAS ACTING PROSE, PLAINTIFF REPORTED PROHIBITED DISCRIMINATION, DEFENSE USED AGE DISCRIMINATION FOR COURT.

PLAINTIFF ONLY WANTED TO DEAL WITH DISCRIMINATION, NOT ANYTHING TO DO WITH MERIT PROMOTIONAL, THEREFORE THE CASE WAS TOP HEAVY WITH THE DEFENSE PAPER.

ON A PAGE ONE DOCUMENT CASE C92-102R ORDER GRANTING DEFENDANTS MOTION FOR SUMMARY JUDGMENT, U.S. DISTRICT COURT AT SEATTLE, WA PAGE ONE BACKGROUND, LINES 23, 24, 25, 26, PAGE TWO, LINES 1, 2, 3, 4, UNTRUE PLAINTIFF DID NOT HAVE OPPORTUNITY TO CHALLENGE OR ANSWER BASICALLY A BUNCH OR UNTRUE AND UNNEEDED PAPER.

THEREFORE PLAINTIFF ASKED FOR AN APPEAL.

SINCERELY
JAMES ROBERT BURCHARD
PROSE

JUNE P. BURCHARD,
WIFE

COPIES
(SEATTLE AND CALIFORNIA U.S. COURT APPEALS),

SENDER:

- Complete items 1 and/or 2 for additional services.
- Complete items 3, and 4a & b.
- Print your name and address on the reverse of this form so that we can return this card to you.
- Attach this form to the front of the mailpiece, or on the back if space does not permit.
- Write "Return Receipt Requested" on the mailpiece below the article number.
- The Return Receipt Fee will provide you the signature of the person delivered to and the date of delivery.

I also wish to receive the following services (for an extra fee):

1. ☐ Addressee's Address
2. ☐ Restricted Delivery

Consult postmaster for fee.

3. Article Addressed to:

UNITED STATES DISTRICT COURT
OFFICE OF THE CLERK
UNITED STATES COURTHOUSE
2ND FLOOR
SEATTLE, WA 98104

4a. Article Number P-886-414-746

4b. Service Type
☐ Registered ☐ Insured
☒ Certified ☐ COD
☐ Express Mail ☐ Return Receipt for Merchandise

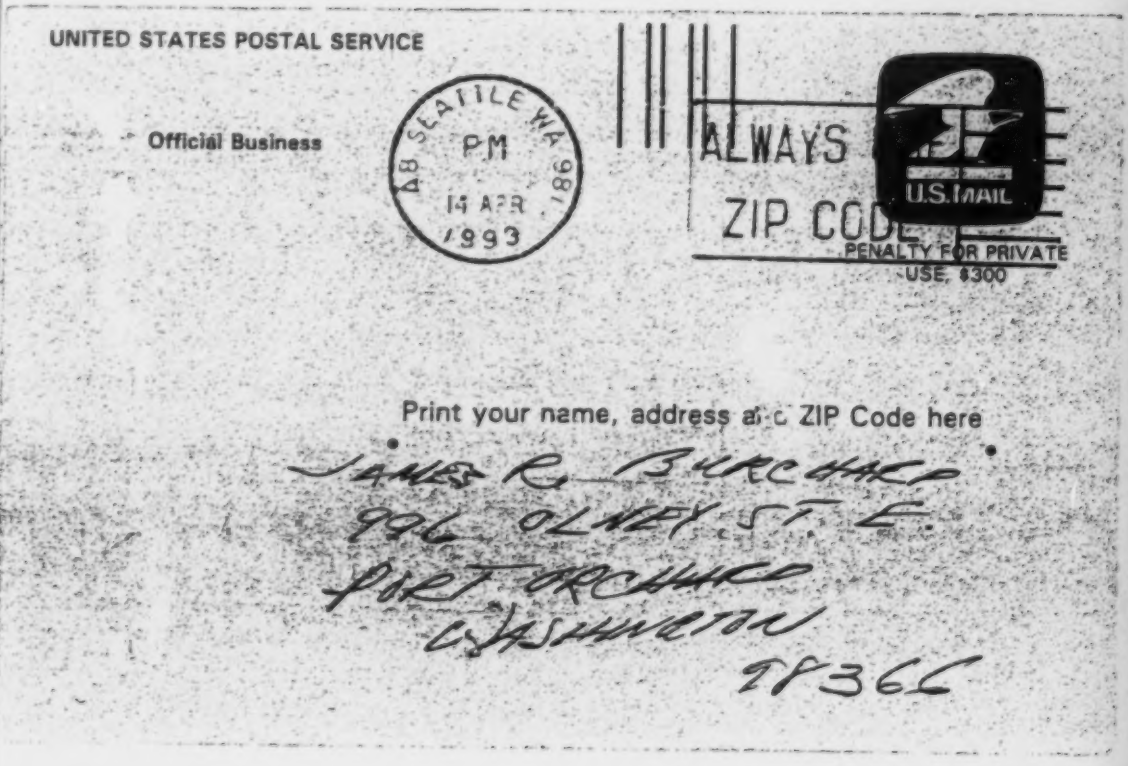
5. Signature (Addressee)

6. Signature (Agent)

7. Date of Delivery 14 APR 1993

8. Addressee's Address (Only if requested and fee is paid)

PS Form 3811, November 1990 *U.S. GPO: 1991—287-068 DOMESTIC RETURN RECEIPT


UNITED STATES POSTAL SERVICE

Official Business

AB SEATTLE WA 981
PM
14 APR
1993

ALWAYS
ZIP COD

U.S. MAIL

PENALTY FOR PRIVATE
USE, $300

Print your name, address and ZIP Code here

JAMES R. BURCHARD
996 OLNEY ST. E.
PORT ORCHARD
WASHINGTON
98366

Is your RETURN ADDRESS completed on the reverse side?

SENDER:

- Complete items 1 and/or 2 for additional services.
- Complete items 3, and 4a & b.
- Print your name and address on the reverse of this form so that we can return this card to you.
- Attach this form to the front of the mailpiece, or on the back if space does not permit.
- Write "Return Receipt Requested" on the mailpiece below the article number.
- The Return Receipt will show to whom the article was delivered and the date delivered.

I also wish to receive the following services (for an extra fee):

1. ☐ Addressee's Address
2. ☐ Restricted Delivery

Consult postmaster for fee.

3. Article Addressed to:
United States Court of appeals
Office of the Clerk
P.O. Box 19393
Spear Street
San Francisco, CA 94119-

4a. Article Number
P 886 414 776

4b. Service Type
☐ Registered ☐ Insured
☒ Certified ☐ COD
☐ Express Mail ☐ Return Receipt for Merchandise

7. Date of Delivery

5. Signature (Addressee)

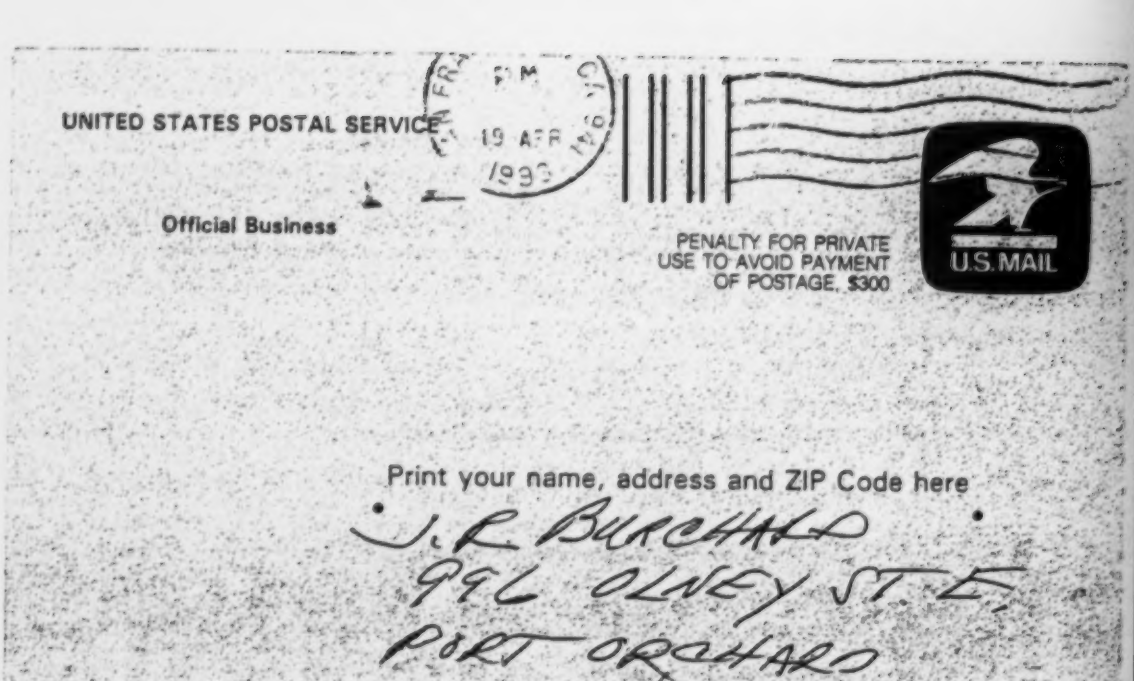
RECEIVED
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS
APR 19 1993

8. Addressee's Address (Only if requested and fee is paid)

6. Signature (Agent)

PS Form 3811, December 1991 ☆ U.S.G.P.O. 1992-307-530 DOMESTIC RETURN RECEIPT

DOCKETED


UNITED STATES POSTAL SERVICE
Official Business
PENALTY FOR PRIVATE USE TO AVOID PAYMENT OF POSTAGE, $300
U.S. MAIL
Print your name, address and ZIP Code here
J. R BURCHALD
991 OLNEY ST. E.
PORT ORCHARD
WA 98366

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 93-35425
CT/AG#: CV-92-00102-R

JAMES ROBERT BURCHARD, and; JUNE P. BURCHARD
Plaintiffs - Appellants

v.

H. LAWRENCE GARRETT, III, Secretary, Department of Navy
Defendant - Appellee

Appeal From the United States District Court for the Western District of Washington (Seattle)

ON CONSIDERATION WHEREOF,. It is now here ordered and adjudged by this Court, that the appeal in this cause be, and hereby is dismissed.

Filed and entered December 01, 1993.

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES ROBERT BURCHARD; JUNE P. BURCHARD,

Plaintiffs - Appellants,

v.

H. LAWRENCE GARRETT, III, Secretary, Department of Navy,

Defendant-Appellee.

No. 93-35425

D.C. No. CV-92-00102-R

MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
Barbara J. Rothstein, District Judge, Presiding

Submitted November 17, 1993**

Before: SCHROEDER, D.W. NELSON and THOMPSON, Circuit Judges

James Robert Burchard and June P. Burchard (the Burchards) appeal pro se the district court's summary judgment for the Secretary of the Department of the Navy in their action under Title VII, 42 U.S.C. § 2000e et seg., and the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seg. The government contends we lack jurisdiction because the notice of appeal is untimely. We agree and dismiss the appeal.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a) ; 9th Cir. R. 34-4.

A timely notice of appeal is mandatory and jurisdictional. Munden v. Ultra-Alaska Assocs., 849 F.2d 383, 386 (9th Cir. 1988). "Under Fed. R. App. P. 4(a) (1), in a matter where the United States is a party, a notice of appeal must be filed within sixty days after the date of the which is being appealed." United States v. Nutri-Cology, Inc., 982 F. 2d 394, 396 (9th Cir. 1992). The district court may extend the time for filing a notice of appeal if a party (1) moves for an extension of time no later than thirty days after the expiration of the original appeal period, and (2) makes a sufficient showing of good cause or excusable neglect for not meeting the original deadline. Fed. R. App. P. 4 (a) (5); Malone v. Avenenti, 850 F. 2d 569, 571 (9th Cir. 1988).
Where the appellant fails to seek an extension of time in the district court, we lack the authority to either grant an extension or remand to the district court for a determination regarding whether an extension was warranted. Hoag Ranches v. Stockton Production Credit Assoc., 846 F.2d 1225, 1229 (9th Cir. 1988) (order).

Here, the district court's judgment was entered on February 22, 1993. Therefore, the Burchards were required to file a notice of appeal by April 21, 1993. See Fed. R. App. P. 4 (a) (1) ; Nutri-Cology, Inc., 982 F. 2d at 396. The Burchards, however, did not file a notice of appeal until April 26, 1993. Although the Burchards' notice of appeal was not filed within the sixty-day time limit, they appear to argue that it was timely because they originally sent it by certified mail to this court on March 12, 1993. Apparently they sent the notice of appeal to the wrong address and

discovered on April 12, 1993 that it had not been received by this court or the district court. Subsequently, the Burchards mailed another notice of appeal to the district court which was received five days after the filing deadline.

Regardless of the alleged factual circumstances, because the Burchards failed to file a notice of appeal within the initial sixty-day period set forth in rule 4 (a) (1) and failed to file a motion requesting an extension of time within the thirty-day grace period set forth in rule 4 (a) (5) , we dismiss the appeal for lack of jurisdiction. See Malone, 850 F. 2d at 572-74 ; In re Hoag Ranches, 846 F. 2d at 1229.

DISMISSED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES ROBERT BURCHARD; JUNE P. BURCHARD,

Plaintiffs - Appellants,

v.

H. LAWRENCE GARRETT, III, Secretary, Department of Navy,

Defendant - Appellee.

NO. 93-35425

D.C. No. CV-92-00102-R
Western Washington
(Seattle)

ORDER

Before: SCHROEDER, D. W. NELSON, and THOMPSON, Circuit Judges

The panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JAMES R. BURCHARD and JUNE P. BURCHARD, husband and wife,

Plaintiffs,

v.

H. LAWRENCE GARRETT, III, Secretary, Department of the Navy,

Defendant.

No. C92-102R
ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS MATTER comes before the court on the defendant's motion for summary judgment. Having reviewed the motion together with all documents filed in support and in opposition, and being fully advised, the court finds and rules as follows:

I. Background

Plaintiffs James and June Burchard, appearing pro se, brought this action against the Secretary of the Navy, alleging that defendant breached a settlement agreement on Mr. Burchard's claim of age discrimination. For the four years between 1977-1980, Mr. Burchard had been appointed each spring as a temporary Reactor Plant General Foreman at the Puget Sound Naval Shipyard. In the spring of 1981, Mr. Burchard was not promoted to the newly opened position of a permanent Reactor Plant General Foreman. On May 26, 1981, Mr. Burchard filed an age discrimination complaint with the Equal Employment Opportunity Commission ("EEOC") due to the failure of Puget Sound Naval

Shipyard to promote him to a permanent General Foreman.

Mr. Burchard's EEOC complaint was resolved in the settlement agreement reached on March 30, 1983 with the department of the Navy. See Declaration of Armando Morales, Exhibit 3, "Memorandum of Settlement." This settlement agreement provided that his personnel record would be altered so that his status at the time of his retirement would be as if he had been promoted to the position of a permanent Reactor Plant General Foreman. Id. The settlement agreement further provided that the "date of retirement, for the purpose of this agreement, is the date Workman's Compensation or the retirement annuity commenced, whichever is the earlier date." Id. In return, Mr. Burchard agreed to withdraw his EEOC complaint and further agreed to not bring either an administrative or civil action based on his complaint.

Pursuant to the settlement agreement, on April 5, 1983, Mr. Burchard's personnel record was changed so that through May 17, 1982, the date of his formal retirement, his pay status was listed as a permanent Reactor Plant General Foreman. Declaration of Armando Morales, ¶ 8.

The basis of Mr. Burchard's complaint in this court is that the Puget Sound Naval Shipyard has paid Mr. Burchard's compensation at rates other than were agreed to in settlement of his age discrimination claim. Specifically, Mr. Burchard alleges that the Puget Sound Naval Shipyard breached the settlement agreement by not using June 12, 1981 as his retirement date, incorrectly computing his compensation, and incorrectly processing his "buyback" of annual and sick leave.

II. DISCUSSION

A. Standard of Review.

On a motion for summary judgment, this court will look at the evidence in the light most favorable to the non-moving party, and determine whether there are any genuine issues of material fact which would require a jury or judge to resolve the parties' differing versions of the truth at trial. Sierra Club v. Penfold, 857 F. 2d 1307, 1320 (9th Cir. 1988). If the non moving party will bear

the burden of proof at trial on an essential element of its case, and that party fails to make a showing sufficient to establish a genuine dispute of fact as to that element, then summary judgment is appropriate. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

B. Statute of Limitations.

This court has jurisdiction over a settlement agreement resolving an underlying age discrimination complaint pursuant to the Age Discrimination in Employment Act ("ADEA") , 29 U.S.C. §§ 621 et seg.See Blank v. Donovan, 780 F. 2d. 808, 809-810 (9th Cir. 1986). The Ninth Circuit has held that the applicable statute of limitations for such actions is governed by 28 U.S.C. § 2401(a), which mandates a six-year limitations period for all civil actions filed against the United States. Lubniewski v. Lehman, 891 F. 2d 216, 221 (9th Cir. 1989) ("federal employee ADEA claims ...are subject to the six year catch-all statute of limitations for nontort civil claims against the United States"). Defendant contends that plaintiffs' failed to file their action in this court within this statutorily defined six-year limitations period.

Based on considerations of sovereign immunity, statutes of limitations in suits against the federal government are jurisdictional. See Diliberti v. United States, 817 F. 2d 1259, 1261 (7th Cir. 1987). The burden is on the plaintiffs to establish that the jurisdictional requirements are met. Marks v. Turnage, 680 F. Supp. 1241, 1243 (N.D. Ill. 1988) (citations omitted).

1. Accrual of the Plaintiffs' Cause of Action .

28 U.S.C. § 2401 (a) provides in relevant part that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." A cause of action "first accrues" at the time that the plaintiff began to suffer the alleged disadvantage. Walters v. Secretary of Defense, 725 F. 2d 107, 114 (D.C. Cir. 1983) (plaintiff's right of action first accrued within the meaning of section 2401 (a) when he received his less-than-honorable discharge, not when the discharge review board denied his request for an upgrade).

Defendant contends that plaintiffs' right of action first accrued when defendant took the administrative action which allegedly breached the 1983 settlement agreement. This action was taken by the Puget Sound Naval Shipyard on April 5, 1983, when Mr. Burchard's personnel record was modified to reflect that he was a Reactor Plant General Foreman when he retired. See Declaration of Armando Morales,
¶ 8. An April 5, 1983 date of first accrual would cause the statute of limitations period to run on April 5, 1989. Plaintiffs filed their action in this court on January 24, 1992.

2. Tolling the Statute of limitations Period.

Plaintiffs contend that their pursuit of administrative remedies after the alleged breach of the settlement agreement tolls the statute of limitations period. EEOC regulations provide that a complainant shall notify the EEOC of any alleged noncompliance with a settlement agreement which resolves an age discrimination complainant, "within 30 days of when the complainant knew or should have known of the alleged noncompliance." 29 C.F.R. § 1613.217 (b). The " agency," in this case the Puget Sound Naval Shipyard, then has 30 days "in which to resolve the matter and to respond to the complainant, in writing, concerning the matter." 29 C.F.R. § 1613.217 (b). This constitutes the Puget Sound Naval Shipyards's "final decision" of whether or not there was noncompliance with settlement agreement. 29 C. F. R. § 1613.217 (b).

If the employing agency has not responded to the complainant within 30 days, or "If the complainant is not satisfied with the agency's attempt to resolve the matter, the complainant may appeal to the [EEOC] for a determination as to whether the agency has complied with the terms of the settlement agreement..."

As required, Mr. Burchard notified the EEOC and the Puget sound Naval Shipyard of the alleged breach of the settle-

ment agreement. See Defendant's Exhibit 1, EEOC Appeal Decision, dated December 20, 1991, at 1. Mr. Burchard then timely appealed to the EEOC office of Review and Appeals the Puget Sound Naval Shipyard's final decision that no breach had occurred. Id. On December 20, 1991, the EEOC Office of Review and Appeals affirmed the Puget Sound Naval Shipyard's prior decision that the settlement agreement had not been breached. Id. As noted above, plaintiffs filed this action in district court shortly thereafter.

In Marks v. Turnage, 680 F. Supp. 1241, 1243 (N.D. Ill. 1988), the EEOC entered a final finding of no discrimination with respect to the plaintiff's age discrimination complaint. The plaintiff then chose to pursue an administrative appeal of this finding to the EEOC Office of Review and Appeals. Id. Approximately two and one-half years later, the EEOC denied plaintiff relief and affirmed the finding of no discrimination. The six-year statute of limitations period expired during the two and one-half years that plaintiff's EEOC appeal was pending. Id. at 1242-1244.

The court noted that plaintiff was not required to pursue her claims administratively before filing her complaint in federal court. Marks, 680 F. Supp. at 1244. Where a party is compelled to resort to administrative proceedings before initiating a federal action, that party's cause of action first accrues under 28 U.S.C. § 2401 when the administrative proceedings have been completed. Id. (citing Crown Coat Front Co. v. United States, 386 U.S. 503, 510-514 (1967)

The court held , however, that where "administrative proceedings are not required before a civil action may be brought, a cause of action first accrues when the injury occurs and suit may be brought" Marks 680 F. Supp. at 1244 (emphasis added) (citations omitted). Plaintiff's age discrimination claim was therefore found to be time-barred under 28 U.S.C. § 2401, and was dismissed due to the court's lack of subject matter jurisdiction. Id.; see also Spannus v. United States Dept. of Justice, 824 F. 2d 52, 57 (D.C. Cir. 1987) (holding that plaintiff's pursuit of permissive administrative remedies for a FIOA claim, not required for exhaustion, did not toll statute of limitations under 28 U.S.C. § 2401); Group Health, Inc. v. United States, 622 F. Supp. 753, 763 (S.D.N.Y. 1987) (plaintiff's pursuit of permissive administrative remedies

with respect to its FTCA claim did not toll statute of limitations under 28 U.S.C. § 2401); United States v. Kubrick, 444 U.S. 111, 114-115 (1979) (date of accrual for an FTCA claim is not postponed during the pendency of a separate administrative appeal).

Mr. Burchard's appeal to the EEOC Office of Review and Appeals did not change the date on which his cause of action accrued. Rather, plaintiffs' cause of action first accrued at the conclusion of the mandatory administrative proceedings. These mandatory administrative remedies consist solely of first, sending written notice to the EEOC and Puget Sound Naval Shipyard within 30 days of the April 5, 1983 administrative act which allegedly caused the breach of the settlement agreement; and, second, waiting and additional 30 days for the Puget Sound Naval Shipyard to respond in writing. See 29 C.F.R. § 1613. 271 (b).

Assuming the maximum time for pursuit of plaintiffs' mandatory administrative remedies for the purposes of this motion, or 60 days from the alleged breach, plaintiff's cause of action first accrued on June 5, 1983. This would cause the statute of limitations period to run on June 5, 1989. Plaintiffs filed their action in this court almost two and one-half years later, on January 24, 1992. Plaintiffs' complaint in these matter was therefore filed outside the six year statute of limitations dictated by 28 U.S.C. § 2401 (a), and the court lacks subject matter jurisdiction over the plaintiffs' complaint.

It is ORDERED, ADJUDGED, and DECREED that:
(1) defendant's motion for summary judgment is GRANTED;
(2) plaintiff's complaint is DISMISSED with prejudice; and,
(3) plaintiffs' motion to amend the scheduling order is STRICKEN as moot.

DATED at Seattle, Washington this 22nd day of February, 1993.

Barbara J. Rothstein
Chief United States District Judge

Supreme Court, U.S.
FILED
AUG 17 1994
OFFICE OF THE CLERK

(2)

No. 93-1644

In the Supreme Court of the United States

OCTOBER TERM, 1994

JAMES R. BURCHARD AND JUNE P. BURCHARD,
PETITIONERS

v.

JOHN H. DALTON, SECRETARY OF THE
DEPARTMENT OF THE NAVY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether petitioners filed a timely notice of appeal.

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In the Supreme Court of the United States

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 6a-9a) is unpublished, but the decision is noted at 12 F.3d 1105 (Table). The opinion of the district court (Pet. App. 11a-16a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 1, 1993. A petition for rehearing was denied on January 11, 1994. Pet. App. 10a. The petition for writ of certiorari was filed on April 11, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner James R. Burchard (Burchard) worked as a temporary Reactor Plant General Foreman at the Puget Sound Naval Shipyard from 1977 to 1981. When Burchard was not promoted to the newly opened position of permanent Reactor Plant General Foreman, he filed a complaint with the Equal Employment Opportunity Commission (EEOC), alleging age discrimination. Pet. App. 11a-12a.

Burchard's EEOC complaint was resolved in a settlement agreement reached with the Department of the Navy on March 30, 1983. The agreement provided that the Navy would alter his personnel record so that it would reflect that he retired at the position of permanent Reactor Plant General Foreman. Burchard, in turn, agreed to withdraw his EEOC complaint and to refrain from bringing any further administrative or civil actions based on the complaint. Pursuant to the agreement, Burchard's personnel record was changed on April 5, 1983, to list his pay status as a permanent Reactor Plant General Foreman through the date of his formal retirement, May 17, 1982. Pet. App. 12a.

2. On January 24, 1992, Burchard and his wife, petitioner June P. Burchard (collectively, petitioners) filed a pro se complaint in the United States District Court for the Western District of Washington alleging a breach of the settlement agreement. Petitioners claimed that the Navy had used the wrong retirement date and thus had computed some benefits incorrectly. Pet. App. 11a, 12a. The district court granted the Navy's motion for summary judgment on February 22, 1993, on the ground that the applicable six-year statute of

limitations, found in 28 U.S.C. 2401(a),[1] had expired. Pet. App. 13a-16a.

3. The court of appeals dismissed petitioners' appeal for lack of jurisdiction due to an untimely notice of appeal. Pet. App. 6a-9a. The court of appeals noted that, because the district court's judgment was entered on February 22, 1993, petitioners were required by Fed. R. App. P. 4(a)(1) to file a notice of appeal by April 21, 1993.[2] The court found, however, that petitioners did not do so until April 26, 1993. Pet. App. 8a. Therefore, the court of appeals held that petitioners' notice of appeal was not timely filed. *Id.* at 9a. The court of appeals subsequently denied petitioners' petition for rehearing. *Id.* at 10a.

ARGUMENT

Petitioners argue that their notice of appeal was timely filed. Pet. 5-6. It was not.

When the United States is a party, a notice of appeal must be filed within 60 days after the date of entry of judgment. See Fed. R. App. P. 4(a)(1). This requirement is mandatory and jurisdictional. See, *e.g.*, *Munden* v. *Ultra-Alaska Assocs.*, 849 F.2d 383, 386 (9th Cir. 1988), citing *Browder* v. *Director, Dep't of Corrections*, 434 U.S. 257, 264 (1978). Because the district court's judgment was entered on February 22, 1993, see Pet. 4; Pet. App. 8a, 11a, petitioners were required to file their notice of appeal by April 23, 1993.

---

[1] Section 2401(a), "the general statute of limitations governing actions against the United States," *United States* v. *Mottaz*, 476 U.S. 834, 838 (1986), provides in relevant part that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."

[2] According to our calculations, sixty days from February 22 was April 23, 1993. Even so, petitioners' notice was out of time.

The only notice of appeal received by the district court in this case was a letter written by petitioners and dated April 12, 1993. Pet. App. 1a. This letter was stamped as having been received by the district court on April 26, 1993, App., *infra*, 1a, and filed by that court on April 27, 1993, App., *infra*, 2a. Receipt on even the former date was three days out of time.

As the court of appeals noted (Pet. App. 8a-9a), petitioners alleged in the court of appeals that they originally sent a notice of appeal to the district court by certified mail on March 12, 1993, and that on April 12, 1993, they discovered that they had sent the notice to the wrong address. Petitioners also alleged that, upon learning of their mistake, they mailed a second notice of appeal on April 12, 1993. The letter received by the district court on April 26 also alleges that a letter dated March 12 was mailed by petitioners and was "lost." App., *infra*, 1a; Pet. App. 1a.

In their petition, petitioners now allege for the first time that, on April 13, 1993, they sent their notice of appeal to the clerk of the district court and that the district court received the notice of appeal on April 14, 1993. Pet. 4, 6. Petitioners also allege for the first time that on April 16, 1993, they sent their notice of appeal to the clerk of the court of appeals, and that the court of appeals received the notice of appeal on April 19, 1993. *Ibid.* In support of these claims, petitioners have produced certified mail receipts indicating that the district court and the court of appeals received mail from petitioners on April 14 and April 19, respectively. Pet. App. 2a-5a. However, these receipts do not indicate what it was that petitioners sent to the district court and the court of appeals.

Neither petitioners' new factual assertions nor the certified mail receipts with which petitioners have now

come forward establish that petitioners' notice of appeal was timely filed. The earliest date stamped on the notice of appeal filed in the district court is April 26, 1993. App., *infra*, 1a. That notice of appeal was apparently filed at least three days out of time. The government has examined the records before the district court and the court of appeals and has failed to locate any timely filed notice of appeal.

The government did discover, in the record before the court of appeals, a memorandum dated May 13, 1993, written by the deputy clerk of the district court. App., *infra*, 3a. The memorandum indicates that on April 19, 1993, the district court received from petitioners several documents, including one styled "Appeal of Initial." These documents are reproduced in the Appendix to this brief. See App., *infra*, 4a-8a. The memorandum also indicates that Mrs. Cooney, a "representative" of petitioners, informed the deputy clerk at some later date that the documents received on April 19 were intended to constitute a notice of appeal from the district court's summary judgment order in this case. App., *infra*, 3a.[3] A notice of appeal of the district court's order received on April 19 would have been timely filed. None of the documents reproduced in the Appendix, however, can fairly be read as a notice of appeal of the district court's order, even allowing for the fact that petitioners are pro se. It is noteworthy that the lead document, styled "Appeal of Initial," has an "Equal Empolyment [*sic*] Opportunity Commission" caption and bears no resemblance to the letter received by the district court on April 26—which expressed petitioners' desire to appeal

---

[3] The memorandum refers to "the Rothstein case." Barbara J. Rothstein was the district judge in this case. Pet. App. 16a.

the district court's order. Compare App., *infra*, 1a with App., *infra*, 4a-5a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

AUGUST 1994

APPENDIX

C58

UNITED STATES DISTRICT COURT
OFFICE OF THE CLERK
UNITED STATES COURTHOUSE
2ND FLOOR
SEATTLE,WASHINGTON 98104



APRIL 12th 1993

(ORINGIAL DATE OF LOST CERTIFIED LETTER
MARCH 12th 1993)P 886 414 713

JAMES ROBERT BURCHARD
JUNE P BURCHARD PLAINTIFF
996 OLNEY STREET EAST
PORT ORCHARD,WASHINGTON 98366
phone 206-876-3281

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF SEATTLE,
AT SEATTLE

NUMBER C92-102R

ORDER GRANTING DEFENDANTS MOTION FOR SUMMAry judgement

PLIANTIFF WISH TO APPEAL THE DECISION

PLAINTIFF DID NOT HAVE OPPORTUNITY HIS DEPOSITION,NOR PRE TRIAL, NOR MEDIATION,PLAINTIFF WAS ACTING PROSE,PLAINTIFF REPORTED PROHIBITED DISCRIMINATION,DEFENSE USED AGE DISCRIMINATION FOR COURT.

PLIANTIFF ONLY WANTED TO DEAL WITH DISCRIMINATION ,NOT ANYTHING TO DO WITH MERIT PROMOTIONAL,THEREFORE THE CASE WAS TOP HEAVY WITH THE DEFENSE PAPER.

ON PAGE ONE DOCUMENT CASE C92-102R ORDER GRANTING DEFENDANTS MOTION FOR SUMMARY JUDGEMENT ,U.S.DISTRICT COURT AT SEATTLE,WA PAGE ONE BACKGROUND,LINES 23,24,25,26,page TWO LINES 1,2,3,4 UNTRUE PLAINITIFF DID NOT HAVE OPPORTUNTIY TO CHALLENGE OR ANSWER BASICALY A BUNCH OR UNTRUE AND UNEEDED PAPER.

THEREFORE PLAINITIFF ASKED FOR AN APPEAL.

SINCERELY

JAMES ROBERT BURCHARD
PROSE

JUNE P.BURCHARD,
WIFE

COPIES
SEATTLE AND CALIFORNIA U.S. COURT APPEALS,

THE ORIGINAL THE CERTIFED LETTER SUBMITTED MARCH 12th 1993,no P 886 414 713 have been signed by a clerk,but unkown because we can not read his signature

UNITED STATES DISTRICT COURT
OFFICE OF THE CLERK
UNITED STATES COURTHOUSE
2ND FLOOR
SEATTLE,WASHINGTON 98104

FILED
LODGED
RECEIVED
MAIL
APR 27 1993
AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
BY DEPUTY

APRIL 12th 1993

(ORINGIAL DATE OF LOST CERTIFIED LETTER
MARCH 12th 1993)P 886 414 713

JAMES ROBERT BURCHARD
JUNE P BURCHARD PLAINTIFF
996 OLNEY STREET EAST
PORT ORCHARD,WASHINGTON 98366
phone 206-876-3281

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF SEATTLE,
AT SEATTLE

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THEREFORE PLAINITIFF ASKED FOR AN APPEAL.

ENTERED
ON DOCKET
MAY 03 1993
By Deputy

SINCERELY

JAMES ROBERT BURCHARD
PROSE

JUNE P.BURCHARD,
WIFE

COPIES
(SEATTLE AND CALIFORNIA U.S. COURT APPEALS,)

THE ORIGINAL THE CERTIFED LETTER SUBMITTED MARCH 12th 1993,no P 886 414 713 have been signed by a clerk,but unkown because we can not read his signature.

1/7

07/08/94 13:56 002

MEMORANDUM
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
at Seattle

93-35425

TO: MPGregory, Appeals Clerk

FROM: LBRogers, Deputy Clerk

DATE: 5/13/93

RE: James Burchard, C92-102R

Today I spoke with a Mrs. Cooney, a representative for the above-named individual. She indicated that the attached paperwork is to be put with the Notice of Appeal of Mr. Burchard in case number C92-102R. The reason that I have had the paperwork is because Mr. Burchard forwarded the paperwork to me on 4/19/93 with no explanation. The top document, Appeal of Initial, did not indicate a U.S. District Court case number and appeared to be appealing an EEOC decision. I subsequently put it on my "P" List to await a $120.00 filing fee for a civil case. I later found out through the Cooneys that the attached paperwork was intended to be for his appeal of the Rothstein case. Please attach the aforesaid to his appeal.

If you have any questions, let me know.

cc: James Burchard

RECEIVED
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS
MAY 19 1993
FILED
DOCKETED
DATE

EQUAL EMPOLYMENT OPPORTUNITY COMMISSION
OFFICE OF FEDERAL OPERATIONS
P.O BOX 19848
WASHINGTON,D.C 20036

APR 19 1993

JAMES R. BURCHARD,
Appellant,

v.

DEPARTMENT OF THE NAVY,
Agency.

APPEAL NO. 01911883
AGENCY no. 81-30

APRIL 15th 1993

APPEAL OF INITIAL

APPELANT STATEMENT OF DISCOVERY

DID NOT HAVE THE OPPORTUNITY TO ANSWER THIS DOCUMENT,SAW IT JUST THREE DAYS AGO,THIS IS FINALY SOMETHING TO GET SOMETHING DONE.

ISSUE

THE OWCP DOCUMENT OCTOBER 22nd 1993,MS KATHLEEN M.DUANE CLAIMS EXAMINER AND MS JOAN PRIMM A SUPERVISOR IN PM MEMO TO THE FILE, TALKED TOGETHER ABOUT THE TREATMENT OF APPELLANT,OCCUPATIONAL ILLNESS DISABILITY. EXHIBIT 1 ATTAHED

ALLENMORE CONFIDENTIAL PSYCHOLOGIST EVALUATION ,ATTACHED ,THEY WERE ADMITTING JOB RELATED INJURY,AGREEING WITH THE DOCTORS. EXHIBIT 2

DATE OF ON THE JOB OCCUPATIONAL DISABILITY HAPPENED JUNE 12th 1981.

THIS WILL SHED LIGHT UPON THE CASE,AND REOPEN THIS CASE,PER NEW INFORMATION,

1

APPELLANT HUMBLY REQUEST COURT APPOINT AN ATTORNEY AND FEES, CAN NOT AFFORD ONE.

2

THIS CASE HAS ANOTHER COURT NUMBER C92-102R,DISTRICT COURT IN SEATTLE,AN APPEALLENT THERE.

AND DOCKET NUMBER SE-3443-93-0178-1-1 APPELLANT,THINKS THAT THE

THIS APPEAL NUMBER 01911885 &AGENCY NO 81-30,MIGHT HAVE BEEN ACTED UPON,PUT APPELLANT DID NOT KNOW ABOUT THIS.

POSSIBILY THE AGENCY DID NOT KNOW EITHER THEY MIGHT COVER UP,BUT APPELLANT DOES NOT MAKE ISSUE OF THIS.

POSSIBILY THE DISTRICT COURT DID NOT KNOW EITHER,THEREFORE APPELLANT FEELS THIS DOCUMENT WOULD BE BEST BECAUSE IT HAS ISSUES OF ALL THREE CASES,BUT POSSIBILY PAPER REDUCTION,LESS PAPER TRAIL WILL HELP SETTLE QUICKER.

THIS IS APPELLANT FEELING AT THIS TIME,MAY WE MOVE ON THIS FIRST, THEN APPLY THE OTHER TWO TOGETHER WITH ALL ISSUES.

SINCERELY

JAMES ROBERT BURCHARD APPELLANT — APRIL 16th 1993 — JUNE P. BURCHARD WIFE

COPIES
MERIT SYSTEMS PROTECTION BOARD
AGENCY WASNINGTON,DC
DISTRICT COURT SEATTLE
APPEALS COURT CALIFORNIA

PART E

APR 19

Page

BURCHARD, JAMES R QUESTIONS/ISSUES IN OWCP/BUY BACK LEAVE CASE.

1. WHY WAS CONTINUATION OF PAY NOT ALLOWED?

COP WAS NOT APPROPRIATE SINCE AN OCCUPATIONAL ILLNESS/DISEASE WAS THE CAUSE OF THE ABSENCE. INJURIES WHICH CAN BE LINKED TO A SPECIFIC INCIDENT/ACCIDENT WITHIN A SPECIFIC DAY OR WORK SHIFT ARE COVERED BY (

2. WHY WAS LWOP DENIED?

THE RECORDS DO NOT REFLECT THAT MR. BURCHARD WAS ADVISED OF HIS RIGHT TO USE LWOP IN LIEU OF SICK OR ANNUAL LEAVE. IT IS AN APPARENT ADMINISTRATIVE ERROR.

3. THE LIFE INSURANCE RATES FORWARDED TO BUREAU OF RETIREMENT WERE WRONG.

THE ORIGINAL SEPARATION DOCUMENTS REFLECTED THE ERRONEOUS RATES FOR WD 08; SUBSEQUENTLY, THESE WERE CORRECTED AND FORWARDED WITH THE CORRECT WS 13 RATES. (A COPY OF THE CORRECTED DOCUMENT IS ATTACHED).

4. IT APPEARS HOLIDAY'S WORKED WERE NOT REPORTED CORRECTLY, ONLY 2 HOLIDAYS WERE REPORTED - THERE SHOULD BE MORE.

ALL WAGE REPORTS ARE BASED ON THE WAGES PAID FROM THE YEAR PRIOR TO THE CLAIMED DATE. THE CLAIM FORM (CA2) NAMED 12 JUNE 1981 AS THE LAST DAY OF WORK. THE HOLCAY'S WORKED WERE FROM 12 JUN 1980 THROUGH 12 JUN 1981. A COPY OF THE 1980-1981 SERVICE RECORD IS ATTACHED.

5. SUNDAY, SATURDAY AND PRESHIFT BRIEFINGS WERE NOT REPORTED.

IT IS UNDERSTOOD THAT OWCP DOES NOT CONSIDER OVERTIME PREMIUM (EVEN IF IT IS PART OF A REGULAR SCHEDULE); CONSEQUENTLY IS WAS NOT REPORTED THIS QUESTION HAS BEEN READDRESSED TO OWCP.

6. THE LEAVE ACCRUALS FROM 12 JUN 1981 - FEB 9 1982 DO NOT APPEAR TO BE CORRECT.

THE ATTACHED SERVICE RECORDS SHOW THAT LEAVE WAS ACCRUED DURING THE PERIOD OF LEAVE EXTENDING THE DATES OF PAID STATUS TO 9 FEB 1982.

7. WHAT IS BEST RECOMMENDATION FOR LEAVE BUY BACK SITUATION?

IT APPEARS THE MOST FINANCIALLY ADVANTAGEOUS TO MR. BURCHARD TO BUY BACK ONLY THE ANNUAL LEAVE. IF OWCP PAYS AT THE RATE OF 307.78 PER WK AMOUNT OWED TO MR. BURCHARD WOULD BE APPROXIMATELY $4,300.00 BEFORE DEDUCTIONS FOR TAXES. (SEE THE ATTACHED ESTIMATES).

IF MR. BURCHARD WISHES TO BUY BACK ALL SICK AND ANNUAL LEAVE AND HAVE THE SICK LEAVE (805 HOURS) FORWARDED TO OPM FOR RETIREMENT BENEFITS CALCULATION THE MONETARY EFFECT WOULD BE: APPROX. $1,000 OUT OF POCKET FROM MR. BURCHARD.

PLEASE NOTE THESES ESTIMATES ARE BASED ON THE ASSUMPTION THAT OWCP WILL PAY AT THE RATE OF 307.78 PER WEEK. IF THIS FLUCTUATES THE AMT WILL OWED TO THE EMPLOYEE.

RECEIVED
APR 1988
DISTRICT
OFFICE

[7a]

3/08/94 13:58 006

DEPARTMENT OF THE NAVY
PUGET SOUND NAVAL SHIPYARD
BREMERTON, WASHINGTON 98314

IN REPLY REFER TO
1811SLS:mm
12713
30 March 1983

APR 19

MEMORANDUM OF SETTLEMENT

This memorandum represents a settlement agreement between James R. Burchard and the Puget Sound Naval Shipyard, resolving the matter of a discrimination complaint. The terms of the agreement are as follows:

Puget Sound Naval Shipyard agrees and promises as an act of the Equal Employment Opportunity Officer, to so modify your official personnel record to reflect that your status at the time of your retirement was as a WS-53083-13. The date of retirement, for the purpose of this agreement, is the date Workman's Compensation or the retirement annuity commenced, whichever is the earlier date.

In return, you will withdraw your complaint that is now before the Equal Employment Opportunity Commission and agree to bring no administrative or civil actions against the Department of the Navy or any of its employees concerning this same complaint in the future.

STEVEN L. SEATON
LCDR, JAGC, USN
Legal Officer

I have read and agree to the above settlement.

JAMES R. BURCHARD
Complainant
Dated 30 March 1983

WILLIAM L. DENEND
Complainant's Representative
Dated 30 March 1983

MEMORANDUM OF SETTLEMENT
PAGE 1 OF 1

A 67 11

07/03/94 13:58 007

B

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Office of Review and Appeals
5203 Leesburg Pike, Suite 900
Falls Church, Virginia 22041

MAY 20 1988

Mr. James R. Burchard
996 Olney Street East
Port Orchard, WA 98366

RE: 01.88.1848

Dear Mr. Burchard:

This is in response to your letter of May 11, 1988, to the Office of Review and Appeals (ORA), asking certain questions regarding your appeal. We will attempt to clarify the issues:

1. We have changed our records to show that the appellant is James Burchard, not June Burchard. It would assist us if further correspondence was signed by or referred to only James.

2. ORA means Office of Review and Appeals. ORA docket number is the number referenced above which this office has assigned to designate your appeal.

3. You do not have to have an agency number to pursue your appeal. That information will be furnished from files requested from the agency. However, it would greatly expedite matters if you were to supply us a copy of the final agency decision that you indicate you received on March 30, 1988.

4. The Office of Review and Appeals can not assist you in filing a civil suit against the agency. However, if you were to file a civil suit at this point, we would have to cease processing your appeal as the Office of Review and Appeals would have no further jurisdictional authority.

5. One of the places you may locate 29 C.F.R., Part 1613 is the public library.

6. We have received all papers you have previously submitted.

We hope we have addressed all of your concerns. Enclosed are two pamphlets on the complaints and appeals process. If you need additional assistance, please let us know.

Sincerely,

Loretta Y. Watson

Loretta Y. Watson
Equal Employment Specialist
Compliance & Control Division
(703) 756-6083

Enclosure

21 11

Supreme Court, U.S.
FILED
SEP 1 1994
OFFICE OF THE CLERK

(3)

No. 93-1644

In The

SUPREME COURT of the UNITED STATES

October Term, 1994

JAMES ROBERT BURCHARD and JUNE P. BURCHARD,
Petitioners,

v.

JOHN H. DALTON, Secretary,
Department of the Navy,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petitioner's Reply Brief

JAMES R. BURCHARD,
appearing pro se
996 Olney Street East
Port Orchard WA 98366
(206) 876-3281

18 pp

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No. 93-1644

In The

SUPREME COURT of the UNITED STATES

October Term, 1994

JAMES ROBERT BURCHARD and JUNE P. BURCHARD,
Petitioners,

v.

JOHN H. DALTON, Secretary,
Department of the Navy,
Respondent.

On Petition for Writ of Certiorari
The United States Court of Appeals
For the Ninth Circuit

Petitioner's Reply Brief

The Respondent's arguments highlight why this Court should grant the Petition for a Writ of Certiorari. The granting of the Petition would clarify and resolve the following questions to-wit:

1. Does a copy of a Notice of Appeal properly addressed, a certified mail receipt and a signed certified mail return receipt postcard constitute sufficient evidence to create a, . . . **rebuttable presumption** OR **a nonrebuttable presumption** . . ., that the Notice of Appeal was delivered to the Clerk of the Court?

2. If such evidence creates a **rebuttable presumption**, what is the quality and quantity of evidence that is needed to rebut the presumption of delivery?

I. A COPY OF A PROPERLY ADDRESSED LETTER, A CERTIFIED MAIL RECEIPT AND A SIGNED RETURN RECEIPT POSTCARD IS SUFFICIENT EVIDENCE TO CREATE A PRESUMPTION THAT THE LETTER WAS RECEIVED BY THE CLERK OF THE COURT.

Respondent's statement (Opp. 4-5) that "Neither Petitioner's new factual assertions nor the certified mail receipts with which Petitioners have now come forward establish that Petitioner's notice of appeal was timely filed" is unfounded in fact and unsupported by reasoned analysis.

In reply to Respondent's interpretation of the operative facts that establish that the Petitioners filed a timely Notice of Appeal, consider the following:

On **April 12, 1993**, the Petitioners discovered that their Notice of Appeal had not been received by the Clerk of the 9th Court of Appeals in San Francisco or by the Clerk of the District Court in Seattle (Pet. App. 9a).

On **April 12, 1993**, the Petitioners

retyped their Notice of Appeal (Pet. App. 1a).

On **April 13, 1993**, the Petitioners sent their Notice of Appeal (Pet. App. 1a) to the Clerk of the District Court in Seattle by certified mail (Pet. App. 2a & 3a).

On **April 14, 1993**, the Clerk of the District Court in Seattle received the Notice of Appeal. The certified mail return receipt shows that an employee of the Office of the Clerk of the District Court in Seattle signed for the Notice of Appeal on April 14, 1993 (Pet. App. 2a & 3a).

> **NOTE: Nowhere in Respondent's brief in opposition (Opp. 4-5) does the Solicitor General deny that an employee of the Clerk of the District Court in Seattle signed the certified mail return receipt on April 14, 1993 (Pet. App. 2a & 3a).**

On **April 16, 1993**, the Petitioners sent their Notice of Appeal (Pet. App. 1a) to the Clerk of the 9th Court of Appeals in San Francisco by certified mail (Pet. App. 4a & 5a).

On **April 19, 1993**, the Clerk of the 9th Court of Appeals in San Francisco received the Notice of Appeal. The certified mail return receipt shows that it was stamped on April 19, 1993, with the official stamp of Cathy A. Catterson, Clerk of U.S. Court of Appeals in San Francisco (Pet. App. 4 & 5).

> **NOTE: Nowhere in Respondent's Brief in Opposition (Opp. 4-5) does the Solicitor General deny that the certified mail return receipt was stamped on April 19, 1993, with the official stamp of**

Cathy A. Catterson, Clerk of the U.S. Court of Appeals in San *Francisco* (Pet. App. 4 & 5).

The last day to file the Notice of Appeal was **April 23, 1993**, Fed. R. App. P. 4 (a) (1).

In Hagner v. United States, 285 U.S. 427 (1932), this Court stated at page 430:

> "The rule is well settled that proof that a letter properly directed was placed in a post office, creates a presumption that it reached its destination in usual time and was actually received by the person to whom it was addressed."

To the same effect see Rosenthal v. Walker, 111 U.S. 185 (1884).

Beck v. Somerset Technologies, Inc., 882 F. 2d 993 (5th Cir. 1989), is a product liability action with Beck as the injured employee, Somerset as the manufacturer of the product and Crown as the purchaser of the product and Beck's employer.

The Court, citing Hagner v. United States (supra), stated at page 996:

> "Thus, the question becomes whether or not Somerset mailed the letter to Crown. If such evidence is presented and not rebutted then it may be presumed that Crown received the warning. The record contains a copy of the properly addressed letter, a certified mail receipt and signed return post cards. Accordingly, we hold that there was sufficient evidence to create a presumption that the letter was received by Crown in the due course of the mail. Thus, the burden of producing evidence of non-delivery shifted to Beck."

There is sufficient evidence in the record of this case, . . . Pet. App. 1a - 5a . . ., to create a presumption that the Notice of Appeal was timely received by the Clerk of District Court in Seattle on April 14, 1993, and by the Clerk of the 9th Court of Appeals on April 19, 1993.

II. **WHILE THE PRESUMPTION OF DELIVERY IS A REBUTTABLE ONE IT IS VERY STRONG PRESUMPTION AND CAN ONLY BE REBUTTED BY SPECIFIC FACTS AND NOT BY INVOKING ANOTHER PRESUMPTION.**

In Roush v. Kartridge, 838 F. Supp. 1328 (S.D. Iowa 1993), the court cited at page 1335:

> "'While the presumption is a rebuttable one it is a very strong presumption and can only be rebutted by specific facts and not by invoking another presumption.' Arkansas Motor Coaches, 198 F. 2d at 191; see also Meckel v. Continental Resources Co., 758 F. 2d 811, 817 (2d Cir. 1985) (holding that under New York law that mere denial of receipt is insufficient to rebut the presumption)."

In the creation of their presumption of delivery, the Petitioners have provided independent third party written evidence from the United States Postal Service that mail from the Petitioners was delivered to the Clerk of the District Court in Seattle on April 14, 1993, and to the Clerk of the 9th Court of Appeals in San Francisco on April 19, 1993.

The Respondent states, at page 4 of his Brief in Opposition, as follows:

> "In support of these claims,

> petitioners have produced certified mail receipts indicating that the district court and the court of appeals received mail from petitioners on April 14 and April 19, respectively Pet. App. 2a-5a. However these receipts do not indicate what it was that the petitioners sent to the district court and the court of appeals.

Anyone who believes ... that the Petitioner sent an empty envelope by certified mail to the Clerk of the District Court in Seattle on April 13, 1993, **OR** that the Petitioner forgot to put the Notice of Appeal in the envelope he sent certified mail to the Clerk of the 9th Court of Appeals in San Francisco on April 16, 1993, **believes in Santa Claus, the Easter Bunny, and the Tooth Fairy.**

A concise compendium of the evidence of non-delivery produced by the Respondent to rebut Petitioner's presumption of receipt follows:

1. The Respondent, at Opp. 4, disputes " . . . what it was that Petitioners sent to the district court and the court of appeals." The mere denial is insufficient to rebut the presumption. Meckel v. Continental Resources Co., 758 F. 2d 811, 817 (2nd Cir. 1985).

> Query: Why didn't the Solicitor General prove what was in the envelopes? Surely some record is kept of incoming certified mail by a deputy clerk at both the District Court and the Court of Appeals. **For instance:** The signed certified mail receipt (Pet. App. 2 & 3) shows that mail was received from the Petitioner

by the Clerk of the District Court at Seattle on April 14, 1993. Each incoming piece of mail is stamped with the Clerk's dated receiving stamp. Surely, it is possible to determine what mail came in a particular day, the description of each type of mail that came in on that particular day, and the sender.

2. Nowhere in Respondent's Brief in Opposition (Opp. 4-5) does the Solicitor General deny that an employee of the Clerk of the District Court in Seattle signed the certified mail return receipt on April 14, 1993 (Pet. App. 2a & 3a).

3. Nowhere in Respondent's Brief in Opposition (Opp. 4-5) does the Solicitor General deny that the certified mail return receipt was stamped on April 19, 1993, with the official stamp of Cathy A. Catterson, Clerk of the U.S. Court of Appeals in San Francisco (Pet. App. 4 & 5).

The Petitioners have provided independent third party written evidence from the United States Postal Service that mail from the Petitioners was delivered to the Clerk of the District Court in Seattle on April 14, 1993, and to the Clerk of the 9th Court of Appeals in San Francisco on April 19, 1993.

What more can the Petitioners do to prove that the Notice of Appeal was timely filed within the purview of Fed. R. App. P. 4 (a) (1)?

III. **CERTIFIED MAIL, RETURN RECEIPT REQUESTED, FURNISHES A SENDER OF MAIL WITH PROOF OF ITS DELIVERY.**

In Reinsurance Co. of America, Inc. v. Administratia, 808 F. 2d 1249 (7th Cir. 1987), the Court stated at page 1253:

> "Certified mail, return receipt requested, . . . is designed . . . to furnish a sender of mail with proof of its delivery, and it is in return for this assurance, . . . that certified mail is more costly."

In Chrysler Motors Corp. v. Schneiderman, 940 F. 2d 911 (3rd Cir. 1991), the Court stated at pages 914 and 915:

> "We also point out that a creditor can protect itself with minimal expense through the use of certified mail with a return receipt requested when filing a proof of claim . . . ."
>
> * * *
>
> "As we have already indicated, Chrysler could have easily at minimal expense used certified mail, return receipt requested."

To the same effect see Taylor v. Freeland & Kronz, 938 F. 2d 420 (3rd Cir. 1991).

On Opp. 5 and on Opp. App. 3a, the Cooneys are mentioned, they run a secretarial service which occasionally does typing for the Petitioners. The Petitioners knew that the Cooneys were going to Seattle on May 13, 1993, so they asked the Cooneys to deliver a check to the Clerk of the U.S. District Court. The Cooneys were not and are not my representatives.

The Petitioner James R. Burchard takes offense at the Solicitor General's specious reflections on his integrity and points out

that he is a member of the Chippewa-Cree tribe of the Turtle Mountain band, a World War II Marine Corps veteran (having been Honorably Discharged on August 22, 1946) and a member of the Church of Latter-Day Saints. He was a Reactor Plant General Foreman (WS-13 Step 5) at the Puget Sound Naval Shipyard in Bremerton, Washington with a security classification of "Secret."

CONCLUSION

WHEREFORE, the Petitioners pray that a Writ of Certiorari be granted to rectify:

1. the misapplication by the Ninth Circuit of this Court's opinions in Houston v. Lack, 487 U.S. 266 (1988) and in Parissi v. Telechron, 349 U.S. 46; and,

2. the misapplication by the Ninth Circuit of Fed. R. App. P. 4 (a) (1).

Respectfully submitted,
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